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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 1058

LILLIAN BLEWEISS SMITH,

Petitioner,

vs.

COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

(Opinion Below Appended)

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PETITION FOR WRIT OF CERTIORARI.

(Opinion Below Appended)

STATEMENT OF MATTER INVOLVED.

Based on diversity of citizenship, petitioner-plaintiff sued respondent-defendant in the United States District Court for the Northern District of Indiana on an accidental death policy on her husband (R. 2). From a judgment dismissing her complaint and refusing leave to amend (R. 62) she appealed to the Seventh Circuit Court of Appeals, which affirmed (R. 74-79). *Smith* v. *Commercial Travelers Mutual Accident Assn.* (C.C.A. 7), 158 F. (2d) 65.

Respondent-defendant is a New York insurance corporation doing business in Indiana (R. 74, 28). Insured was a resident of Pennsylvania when the policy was issued. He was injured and died in Georgia, and immediately after his burial the plaintiff widow came to live with relatives in Indiana, became a *bona fide* citizen of Indiana. *After plaintiff became an Indiana citizen* she furnished *proof of death* to defendant *from Indiana* and from there transacted all matters with defendant concerning the policy, including defendant's act of *sending its agent to plaintiff in Indiana* and there *executing* with her a written autopsy agreement which was a privilege given to defendant by the policy (R. 75-76, 35-37).

Defendant invoked, and the Circuit Court of Appeals enforced, a clause in the policy limiting actions to one year after the accident causing the death (R. 74, 76). Plaintiff sued after the year but less than two years after death, which was less than the statute of limitations of Indiana (R. 75).

Against this contractual limitation, plaintiff invoked the protection of an Indiana statute, *as previously construed by this Court,* and by the same Seventh Circuit Court of Appeals, and by the Indiana courts of last resort, to the effect a foreign insurance company doing business in Indiana, which is sued in Indiana by an Indiana citizen, is precluded of asserting a contractual limitation shorter than three years in an Indiana court (R. 76). She was denied protection of this statute in the decision of the Circuit Court of Appeals on the premise that "the policy had *matured* before it was in affected by the laws of Indiana * * * a contract of insurance *matures at death* * * *", and also on the further premise that Indiana is bound to enforce such a limitation clause in her own courts simply "*because* the contractual

limitation is valid in New York, the *locus contractus* * * *'' (Tr. 76).

Petitioner-plaintiff asserts (1) that the above first premise and ruling on the subject of *maturity* is in *direct conflict* with an Indiana Supreme Court decision rendered eleven days before the decision below, which was called to the attention of the court below but ignored, (2) even if the maturity premise be correct, plaintiff still is entitled to the benefit and protection of Indiana's three-year statute, *as construed by this Court* and by the Indiana courts of last resort, and (3) independently of (1) and (2) the above second premise erroneously extends the *comity* principle so far as to strip Indiana of all power to regulate the *remedial* subject of limitations in her own courts as against a contract on that subject made in another state.

Basis of This Court's Jurisdiction.

Jurisdiction exists under Title 28, Sec. 347 (a), Judicial Code, sec. 240, amended, giving this court jurisdiction to review "any" case by certiorari to a Circuit Court of Appeals.

Questions Presented.

1. Does the opinion below proceed on a false premise contrary to an Indiana Supreme Court decision rendered eleven days earlier, on the subject of when a cause of action "matures" on a policy? (R. 76).

2. Even if the premise be correct, does the decision *deprive* plaintiff of her rights as an Indiana *citizen* under this three-year statute *as construed by this Court* and the Indiana Supreme Court, and improperly *discriminate* against her as compared to other Indiana citizens? (R. 76).

3. A part from Nos. 1 and 2, should the decision lay down the rule of *comity* so broadly as to compel Indiana to enforce a contractual *remedy* which shortens the limitation period in her courts, simply "*because* the contractual limitation is valid in New York, the *loci contractus*," as held in the opinion below (R. 76, bottom), thereby stripping Indiana of all power to enforce her own public policy of protecting her citizens suing in her own courts, on the remedial subject of limitations?

Reasons Relied on for Allowance of Writ.

I.

The basic premise of the decision below is in *direct conflict* with an Indiana Supreme Court decision rendered eleven days earlier. The premise in the opinion below, dated November 19, 1946, is:

> "The policy had *matured* before it was in any way affected by the laws of Indiana * * * Plaintiff, however, insists that in her amended complaint, which the court did not permit to be filed, are allegations that the *notice of death and the proof of loss* which emanated *from Indiana* are conditions precedent to the accrual of the policy. We cannot agree with this reasoning. A contract of insurance *matures at death* and notice of death and filing proof of loss, while essential to the payment of claims, are necessarily subsequent to maturity." (Our emphasis).
>
> R. 76

The precedent, decided November 8, 1946, which was called to the attention of the court below and ignored (R. 84-88), lays down the law of Indiana on this subject

of *maturity* of a policy as follows, in *direct conflict* with the above ruling:

> "In the case at bar the appellant's (insurance company's) promise was 'upon receipt of due proof of death * * * to pay * * *.' *Not merely* the fact of *death* but the fact of *proof* of death, or waiver thereof prior to the filing of the complaint, were *necessary* to *mature* a cause of action." (Our emphasis).
>
> *Equitable Life Assurance Society* v. *Kelleman*, (Ind. Supreme, Nov. 8, 1946) 69 N. E. (2d) 244, 245, Par. 3

The policy in our case contains a provision substantially the same as the one above quoted:

> "Payment of benefits provided by Section A (death benefit, etc.) will be made within sixty days *after* receipt of due *proof* * * * Affirmative *proof* of loss *must* be furnished * * * " (R. 85, 42, 45).

II

Even if the above premise about maturity were correct, the decision *deprives* plaintiff of her rights as an Indiana *citizen* and improperly *discriminates* against her as compared to other citizens of the state, because the following Indiana statute, as *construed* by the following decision of *this Court* and the Indiana courts of last resort, give this privilege of suing within three years to *all* Indiana *citizens* as a *class*, against *all* foreign insurance *companies* doing business in the state as a *class*, without distinction as to the time when the plaintiff *becomes* a citizen of this state, or the condition of "*maturity*" or non-maturity of the policy at the time of becoming a citizen. It is a rule of *public policy* of Indiana to which all foreign companies agree to submit, by their act of doing business in the state.

Sec. 39-1713, Burns' Ann. Sts. 1933 (Original Vol. 8)

Sec. 39-1710, Burns' Ann. Sts. 1933 (Original Vol. 8)

Metropolitan Casualty Ins. Co. v. *Brownell* (1935), 294 U. S. 580, 585, 586; 55 S. Ct. 534, 541

Metropolitan Casualty Ins. Co. v. *Brownell* (C. C.A. 7, 1934), 68 F. (2d) 481, 482, 483

Kernel v. *Nat. Life & Accident Ins. Co.* (1937) 105 Ind. App. 181, 182, 184-185; 12 N. E. (2d) 392. *Transfer denied* by Indiana Supreme Court.

Rutherford v. *Prudential Ins. Co.* (1905), 34 Ind. App. 531, 535-536, 541; 73 N. E. 202

Caywood v. *Supreme Lodge* (1908), 171 Ind. 410, 413; 86 N. E. 482

III.

The decision below lays down the rule of comity so broadly that Indiana will always be compelled to enforce contractual limitations in policies of foreign companies simply *because* the limitation is valid in the state where made. The decision below holds:

> "*Because* the contractual limitation is valid in New York, the *loci contractus*, it is *not* a violation of the *public policy* of Indiana to enforce it in Indiana." (Our emphasis.)
>
> (R. 76, bottom.)

The above ruling is a *non-sequitur*, which in effect strips the above cited Sec. 39-1713 of all meaning. The statute deals only with foreign companies and such companies nearly always *issue* their contracts out of home offices

in their home states in forms valid under the laws of the home state. The ruling also strips Indiana of power to enforce its *public policy* in matters of *remedy*, in favor of its own citizens, suing in its *own courts*, against foreign companies which have impliedly agreed with the state to submit to its public policy by doing business in the state. This ruling conflicts with the decisions of this Court and of Indiana above cited under II. It also conflicts with the following further decisions of this Court and of Indiana, holding that the law of the *forum* governs *all matters of remedy*, such as limitations (or even interest on an unliquidated obligation), even though the contract was made in another state or the cause of action "matured" in another state:

Kavalsky v. *Becker* (1940), 217 Ind. 524, 532; 29 N. E. (2d) 560, 563, par. 9; 131 A. L. R. 1074

Klaxon v. *Stentor Electric Mfg. Co.* (1941), 313 U. S. 487, 494, 497-498; 61 S. Ct. 1020, 1021, 1022; 85 L. Ed. 1477

Townsend v. *Jameson* (1850), 9 How. 407, 413, 13 L. Ed. 194, 197

Wherefore, Petitioner prays that this Court's writ of certiorari may issue to review this cause, and for all proper relief.

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Respondent.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

Summary.

I. The basic premise of the decision below, on the subject of when a policy "matures", is in *direct conflict* with an Indiana Supreme Court decision eleven days earlier, thereby violating the rule in *Erie R. Co.* v. *Tompkins,* 304 U. S. 34.

II. Even if the above "maturity" premise be correct, still petitioner was entitled to protection of the Indiana statute giving her three years to sue, as previously *construed by this Court* and the Indiana courts. The

decision below deprives her of the protection of the statute and of those decisions of this Court and the Indiana courts, and discriminates against her as compared to other Indiana citizens.

III. In the field of conflict of laws, the court below was confronted with a conflict between a one-year limitation clause in a New York contract and the *statutory public policy* of Indiana which allows at least three years to sue on such contracts in Indiana courts. The court below construed the *comity* rule so broadly as to enforce this contractual limitation in Indiana's courts simply,

> "because the contractual limitation is valid in New York, the loci contractus * * *."

This statement of the comity rule is too broad—so broad as to strip Indiana of power to enforce its *public policy* in a strictly *remedial* matter in its *own courts.*

ARGUMENT.

The facts being sufficiently stated in the opening part of the petition and in the opinion below (R. 74-78), are not repeated here. The following law propositions are directed to the Reasons of like number in the petition.

I.

Conflict with Indiana decision on "maturity" doctrine.

The decision below violates the rule in *Erie R. Co.* v. *Tompkins* (1938), 304 U. S. 64, by being based on a "maturity" premise *directly in conflict* with an Indiana Supreme Court decision rendered eleven days earlier. This precedent was called to the attention of the court below as soon as discovered, and while that court still had full jurisdiction to correct its decision to conform to it (R. 84-87), but was ignored by that court (R. 88, bottom). See Reason I in the foregoing petition for quotation and citation of these conflicting decisions.

This "maturity" premise is essential and basic in the decision below. The District Court dismissed the original complaint on the ground that "the plaintiff had become a resident (of Indiana) *after* the action *accrued*. The policy had *matured* before it was in any way affected by the laws of Indiana." (R. 29-31). Plaintiff asked leave to file an amended complaint under Civil Procedure Rule 15 (R. 31), which contained additional fact allegations and documentary exhibits showing that the policy did not "mature" until after she became an Indiana citizen, *because* proof of death and other conditions precedent

emanated from Indiana after plaintiff became a citizen thereof (R. 35-37, Par. 9, R. 76). Defendant objected to its filing on the ground that the action was still barred under the additional facts alleged (R. 62, top, Par. 3). The District Court refused leave to file the amended complaint and rendered judgment of dismissal (R. 62, bottom). The Circuit Court of Appeals' opinion recites the above record and affirms the dismissal on the following premises:

> "The policy had *matured* before it was in any way affected by the laws of Indiana. * * * Plaintiff, however, insists that in her amended complaint, which the court did not permit to be filed, are allegations that the *notice of death and the proof of loss* which emanated from *Indiana* are conditions precedent to the accrual of the policy. We cannot agree with this reasoning. A contract of insurance *matures at death* and notice of death and filing proof of loss, while essential to the payment of claims, are necessarily subsequent to maturity." (Our emphasis.)
>
> R. 76.

The conflicting ruling in the Indiana precedent is likewise essential and basic in that decision. The Indiana opinion says:

> "We need discuss *but one* of the several questions presented by this assignment. * * * At the conclusion of the evidence the appellant was denied a *peremptory instruction* which called to the attention of the court that there was no evidence of submission of *proof of death and therefore no liability.* * * *
>
> "In the case at bar the appellant's (insurance company's) promise was 'upon receipt of due proof of death * * * to pay * * *.' *Not merely* the fact of *death* but the fact of *proof* of death, or waiver thereof prior to the filing of the complaint, were *necessary* to *mature* a cause of action. * * * A *peremptory in-*

struction for appellant should have been given. * * * " (Our emphasis.)

Equitable Life Assurance Society v. *Kelleman*, (Ind. Supreme, Nov. 8, 1946), 69 N. E. (2d) 244, 245-246.

The opinion below, besides violating and ignoring the above Indiana precedent, cites no authority from Indiana or anywhere else to sustain the "maturity" rule laid down (R. 76).

If Reason I, *supra*, is well taken, petitioner respectfully urges that such a *conflict between simultaneous decisions* of the Indiana Supreme Court and the court below, which the latter court has refuesd to rectify (R. 84-88), warrants certiorari without the necessity of considering Reasons II and III.

II.

Erroneous construction of Indiana statute, contrary to construction of same statute by this Court and Indiana courts.

Even, if the premise attacked in Reason I be correct—if petitioner-plaintiff's cause of action "matured" before she became an Indiana citizen,—still she was entitled to the benefit of the Indiana statute when she sued in Indiana.

The Indiana statute cited under Reason II is a remedial one regulating the *time* allowed for filing actions in Indiana courts against foreign insurance *companies* who are doing business in Indiana, as a *class*. The statute is *classification* of foreign *companies*, as this Court and the Indiana courts have held in the cases above cited under Reason II and discussed *infra*. The decision below distorts the statute into a classification of *plaintiffs* and *policies*, and excludes petitioner-plaintiff from its protec-

tion on the ground that her policy "matured" before she came to Indiana.

The title of this statute reads:

> "An act regulating foreign insurance companies, doing business in this state, * * *." (Title quoted in *Kernel* v. *Nat. Life & Acc. Ins. Co.*, 1937, 105 Ind. App. 105, 184, footnote 2; 12 N. E. (2d) 392, 392, footnote 2).

The section of the above statute in question reads:

> "No such insurance company shall insert any condition in any policy hereafter issued requiring the insured to give notice forthwith, or within the period of time less than five (5) days of the loss of the insured property; nor shall any condition be inserted in such policy, requiring the insured to procure the certificate of the nearest justice of the peace, mayor, judge, clergyman or other official or person of such loss, or the amount of such loss; and any provision or condition contrary to the provisions of this section, or any condition in said policy inserted to avoid the provisions of this section, shall be void, and *no condition or agreement not to sue for a period of less than three* (3) *years shall be valid.*" (Acts 1865 (Spec. Sess.), ch. 15, sec. 6, p. 105). (Sec. 9136 Burns' Ann. Sts. 1926). (Our emphasis.)
>
> Sec. 39-1713, Burns' Ann. Sts. 1933 (Original Vol. 8).

Further light on Indiana's public policy is thrown by the following companion statute, also regulating foreign insurance companies:

> "*Every* insurance company and corporation not incorporated by or organized under the laws of the state of Indiana, and now or hereafter *doing business* in this state, *shall be subject to the process of the courts of this state,* in *any* action, suit or other legal proceeding, relating to or founded upon *any claim or demand of any character whatsoever,* held or as-

serted against said company or corporation, *by any citizen of the state of Indiana,* and process against such company or corporation shall be served in the manner as now provided by existing laws; Provided, That this act shall not apply to nor affect any pending litigation." (Originally enacted as Acts 1901, ch. 175, p. 375; Burns' Ann. Sts. 1926, sec. 9136, and amended by Acts 1927, ch. 170, sec. 1, p. 512, in slight changes of phraseology, not material here.)

Sec. 39-1710, Burns' Ann. Sts. 1933.

It is unnecessary to construe the above Section 39-1713 now, because that has already been done both by this Court and the Indiana courts in the cases discussed, *infra*. These judicial constructions have become as much a part of the statute as if contained in the text, as was held in *Supreme Lodge* v. *Meyer,* 265 U. S. 30, 32, 34; 78 L. Ed. 1137; 44 S. Ct. 432, 433, where this Court applied the rule that judicial construction becomes part of a statute, even though the courts of Indiana and Nebraska laid down directly opposite constructions of substantially similar statutes affecting the same insurance association. There is also the further rule in the background of this case that a statute relieving against limitations is remedial and liberally construed in case of doubt, as announced by the court below in *Sachs* v. *Ohio National Life Insurance Company,* (C. C. A. 7, 1942), 131 F. (2d) 135, 137, Par. 4. Coming now to the cases construing the above Section 39-1713:

Kernel v. *National Life & Accident Insurance Co.,* (1937), 105 Ind. App. 181, 182, 184; 12 N. E. (2d) 392, is a case where an Indiana citizen sued a Tennessee company (p. 182, top). The court laid no stress upon the question whether or not the contract *matured* in favor of an Indiana citizen, or was to be *performed* in Indiana, but stressed only the fact that this statute "was an act regulating foreign *companies* doing business in this

state" (p. 184, top). (Our emphasis.) The Indiana Supreme Court denied transfer in the above case, thereby placing the stamp of approval of that court upon the opinion. So far as we know it is the last word of Indiana courts on this statute.

Rutherford v. *Prudential Insurance Co.* (1904), 34 Ind. App. 531, 533-537, 541; 73 N. E. 202. This was an action against a New Jersey corporation. The policy quoted in the opinion is expressly payable "at its home office in the City of Newark, New Jersey" (p. 533). The policy was signed and executed "at its home office in the City of Newark, New Jersey" (p. 534). Hence, it was a New Jersey contract as much as ours is a New York contract. The opinion does not disclose in what state the policy was delivered, or in what state insured died, (apparently attaching no importance to those facts), but does disclose that the essential transactions which were the subject of controversy and upon which the case turned, *occurred in Kentucky* (pp. 535-536). The policy contained a six-months limitation clause which apparently was valid in New Jersey where the policy was executed and payable, but the Indiana court quotes the statute in question, holds the provision invalid under that statute, and permits plaintiff to sue after the specified time (p. 541, end of opinion).

Caywood v. *Supreme Lodge* (1908), 171 Ind. 410, 413; 86 N. E. 482, refers to this statute and says that it applies to any provision in the policy of "a foreign *company* doing business in this state." (Our emphasis.) The court then goes on to decide the question on the ground that the complaint does not show that the company is a foreign one (p. 413, top).

The opinion below is also in basic conflict with the following decision of the same Circuit Court of Appeals,

construing this same statute: *Metropolitan Casualty Insurance Co.* v. *Brownell* (C. C. A. 7, 1934), 68 F. (2d) 481, 482-483. A New York insurance company was sued by an Indiana citizen. The court, like the Indiana courts in the cases above cited, placed no stress or made any distinction upon the incidental questions affecting the *particular contract*, such as whether it was a New York or Indiana contract, whether it *matured* to an Indiana citizen, or otherwise. On the contrary, the court held that it was a legislative declaration of Indiana's *public policy* to the effect that three years is an unreasonable limit within which to require "parties *holding claims* under a policy of foreign insurance to assert their claims, or be forever barred".

The above decision was affirmed by this Court in *Metropolitan Casualty Insurance Co. of New York* v. *Brownell*, 284 U. S. 580, 581, 585-586, 55 S. Ct. 538, 539, 541. The court pointed out that the contract written by this New York company doing business in Indiana contained a *fifteen months limitation clause* (p. 581). The court said:

> "It is not beyond the range of probability that foreign casualty *companies*, as distinguished from domestic *companies*, generally keep their funds and maintain their business offices, and their agencies for the settlement of *claims*, outside the state. * * * We cannot say that these considerations may not have moved the Legislature to insist that a longer time should be given *for bringing suit* against foreign *companies* than the latter. * * * It could likewise decide whether the differences are general enough, as respects foreign companies, to call upon it in the exercise of legislative judgment, not shown to be irrational, to say whether the legislative prohibition should be applied to them as a *class* rather than to members of it selected by more empirical methods." (294 U. S., at pp. 585-586, 55 S. Ct., at p. 541.) (Our emphasis.)

In the above decision of this Court, this same statute is everywhere construed as being a *classification* of *companies*, not a classification of *contracts* of contract *holders*. None of the cases, Federal or Indiana, lay stress upon distinctions between different contracts of contract holders, or the *time* the beneficiary *became* a citizen of the state. It is a statute designed to protect all Indiana citizens who have "claims", in the language of this Court, against foreign companies as a class who do business in Indiana. This Court points out the legitimate basis for the statute, namely: that one who holds a claim against a foreign company may need a longer time to negotiate settlement with the distant home office, or to file suit, than one who holds a claim against a domestic company. This would apply to the present plaintiff as much as to any other claimant. Her need for time is no less than some claimant who moved to Indiana before his contract matured. If anything, her need for time would be greater, because she was a newcomer in the state.

What we have said cannot be answered by the argument in the opinion below that this was a New York contract and valid under New York laws (R. 75-76). It would equally be a New York contract (1) if insured had been a citizen of Indiana at the time it was issued to him, because it was executed at defendant's home office in New York and expressly specifies that it is to be governed by New York law (R. 10, 11, Pars. 12, 18). It would equally be a New York contract (2) if insured had become a citizen of Indiana after the contract was issued and had died in Indiana. It is no more and no less a New York contract by the fact (3) that insured lived in Pennsylvania, died in Georgia, and his widow became an Indiana citizen after his death. If the rule stated below about it being a New York contract and valid under New York law were controlling, it would apply equally to situa-

tions (1) and (2) just mentioned and would render the Indiana statute meaningless.

We believe that the true rule, as laid down by this Court and the Indiana courts in the above cases, is that in all three of the situations last mentioned, Section 39-1713, applies in favor of an Indiana plaintiff, because:

(a) The statute is a classification of *companies,* not a classification of *contracts* or contract *claimants,* and it applies to foreign companies generally. It would be of doutbful constitutionality, and at least highly unreasonable, to draw an arbitrary line between two classes of Indiana citizens, granting one a remedial right simply because he moved to Indiana before the contract matured, and denying the right to the other because he moved to Indiana after it matured. We can think of no reasonable basis for such discrimination, and moreover, there is no reason for engrafting such a provision upon the statute contrary to the above decisions of Indiana, of the court below, and of this Court.

(b) The State has exacted from foreign companies generally a remedial right in favor of all Indiana claimants who sue in Indiana courts, namely: that these companies shall not assert against the Indiana claimants a shorter contractual provision than three years. We wish to emphasize something that seems important to us: This waiver by the companies in favor of Indiana citizens does not result from Indiana's control of the issuance or delivery in the state of the *particular contract;* it results from Indiana's right to exact any conditions it sees fit from foreign companies as the price of doing insurance business in Indiana. For instance, it is common practice for states to require foreign companies to deposit a special fund with their insurance commissioner or state treasurer to guarantee payment of claims of the state's citi-

zens against the company before the state will permit the foreign company to do business within its borders.

What we have said in the last paragraph was recognized by the lower court in the above case of *Metropolitan Casualty Insurance Co.* v. *Brownell* (CCA 7, 1934), 68 F. (2d) 481, where the court pointed out that since Indiana had the power to exclude foreign insurance companies entirely, this necessarily included the power to impose whatever conditions it saw fit as a condition to their doing business in the state (p. 482). This Court carried this point further in the same case when it pointed out, in the language already quoted, that the statute draws a distinction between foreign companies generally and domestic companies based upon the fact that Indiana citizens may need a longer time to settle or sue upon their claims against foreign companies than against domestic ones. *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 585, 586; 55 S. Ct. 538, 541, *supra*.

The thing that saved this same statute from condemnation by this Court in the above case was that it applied to foreign companies generally as a class. It probably would have been struck down had it discriminated between foreign companies, and it would be equally unconstitutional if it actually means to discriminate between classes of Indiana citizens on an arbitrary basis of contract maturity or one of the other arbitrary features mentioned in the opinion, such as the place where insured lived or died, as held in the opinion below.

The above Sections 39-1713 and 39-1710 were repealed in the re-codification of Indiana's insurance laws in 1935, but that repeal has no effect on petitioner-plaintiff's rights because: (1) Both the District Court and the Circuit Court of Appeals expressly *treated* Section 39-1713 as being applicable (R. 29, 76), and (2) this cause of

action arose in the fall of 1933 (R. 75) and was saved by the following broad saving clause in the 1935 Act:

> "*No* right, power, privilege or immunity conferred, vested or secured by or *under any law* or laws hereby repealed shall be impaired or abrogated by reason of such repeal, nor shall such repeal affect any suits pending, *rights of actions conferred*, or *duties*, restrictions, liabilities or penalties imposed or required by or under any such law or laws upon any insurer or insurance *company* created under or *subject* to such law or laws, but every such insurance company shall, as to all actions hereafter performed, be subject to the provisions of this act."
>
> Acts 1935, Ch. 162, sec. 277, p. 812

Moreover, a vast number and amount of foreign insurance policies are now held by Indiana citizens which were issued *prior* to 1935—probably comprising the majority of all insurance policies now held in the state—all of which are still controlled as to contractual limitations by Section 39-1713, so this question is still vital to Indiana and her citizens generally, as well as to petitioner.

III.

Erroneous extension of comity doctrine.

The decision below lays down the rule of *comity* so broadly that Indiana is powerless to enforce her *public policy* against a contractual limitation, in her own courts, simply "*because* the contractual limitation is valid in New York, the *locus contractus*," as stated in the opinion below (R. 76, bottom).

This sweeping and dangerous extension of the comity doctrine does not apply even in favor of foreign *substantive* rights of contract or property. A state has power to refuse enforcement even of these, in its courts, when they conflict with its *statutory public policy*:

A. B. v. *C. D.* (D. C. Pa. 1940), 36 F. Supp. 85, 87, par. 5; Affirmed, 123 F. (2d) 1017; *Certiorari denied,* 314 U. S. 691

Union Trust Co. v. *Grossman* (1918), 245 U. S. 412, 38 S. Ct. 147, 148, 62 L. Ed. 368

Still less does any such comity doctrine apply in favor of a contractual *limitation* clause, which is purely a matter of *remedy,* as held by the following recent Indiana case where the cause of action *arose* in West Virginia, was *sued upon* in Indiana, and it was held:

> "The contract provides that no action on the contract shall be brought after the expiration of *one year* from the time such action accrues. This provision is void under the statute of Indiana, and the statute of limitation applies. The appellees contend that the law of West Virginia should control the time within which the action is brought, but it is well settled that statutes *and rules* governing the time in which actions may be brought affect *only* the *remedy,* and that the law of the *forum* will control." (Our emphasis.)

Karvalsky v. *Becker* (1940), 217 Ind. 524, 530-532; 29 N. E. (2d) 560, 563, par. 9; 131 A. L. R. 1074

This Court recently held that a state, such as Indiana, has a complete right "to *determine* whether a given matter is to be governed by the law of the forum," in a case involving *conflict of laws.* A contract was made in New York, performed in New York and various other states, and sued upon in Delaware. The unliquidated contract obligation would draw interest if sued upon in New York, by virtue of New York's interest statute. But Delaware had no such law. Held: that interest was a matter of *remedy,* and that the Delaware court was not required to enforce that remedial right contrary to her own public policy:

Klaxon v. *Stantor Electric Mfg. Co.* (1941), 313 U. S. 487, 494, 497-498; 61 S. Ct. 1020, 1021, 1022; 85 L. Ed. 1477

In the above case, the statutory right to interest under New York law, where the contract was made and partly performed, would become an implied part of the contract as firmly as the limitation clause in ours, but, being a *remedial* right, the state of the forum was not required to enforce it.

This Court has also held that limitations "*strictly* affect the *remedy* and not the merits," in a case where a contract cause of action "accrued" in Mississippi and had become barred by limitations of that state. Held: the cause could be sued on in Alabama if not yet barred by its laws:

Townsend v. *Jameson* (1850), 9 How. 407, 413; 13 L. Ed. 194, 197

And such is the law generally:

> "And it is held to be *immaterial* that the statutory bar has fully run against the contract in the jurisdiction where it was made, *or that the parties had remained subjects of the foreign state* or country, until the term of limitation had expired, or that plaintiff suing on a contract made in another state has been at all times a resident of that state, *or that the contract provided that it should be governed by the foreign law.*"
>
> 37 C. J. 731

Distinctions:

The only case cited by the lower court to sustain its comity ruling is directly against it: *Henning* v. *Hill*, 80 Ind. App. 363; 141 N. E. 66. The case holds that an oral Illinois contract for real estate commission was enforceable in Indiana "*unless* its enforcement would be

contrary to good morals, *or* in violation of *public policy*, or *forbidden* by positive law" (which is true of the statute in our case). The court in that case held that the Indiana statute of *frauds* did not *forbid* such a contract or make it against *public policy* but merely prescribed the "formality" for making Indiana contracts on that subject (pp. 365-366).

The opinion below discusses a point not in the case when it says that "a person cannot *select* a forum for the commencement of an action and thereby invoke a different and more favorable law *other* than in *strictly procedural* matters than exists in the *lex loci contractus.*" (R. 76).

If the above language means to hold that this limitation question is not "strictly procedural," it violates the above Indiana decision of *Kavalsky* v. *Becker* (1940), 217 Ind: 524, 532, and violates the above decisions of this Court in *Klaxon* v. *Stentor, etc. Mfg. Co.* (1941), 313 U. S. 487, 494, 497-498, and *Townsend* v. *Jameson* (1850), 9 How. 407, 413; 13 L. Ed. 194, 197.

If the above language means to say that petitioner-plaintiff was guilty of any improper purpose in coming to Indiana, it is rebutted by the earlier statement in the opinion that she "became a citizen of Gary, Indiana, as she established residence with relatives" following her husband's burial (R. 75). Her bona fide residence is alleged in the complaint (R. 2) and not questioned by the motion to dismiss, (R. 22-26).

Home Ins. Co. v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, which the lower court's opinion cites on the above nonexistent issue, was a *garnishment* action *in rem*, brought in the Texas court, based upon *publication* with *no personal jurisdiction* of the defendant which was a corporation of Mexico, a foreign country (p. 402). Held: that

Texas could not enforce its public policy against the Mexican corporation in that *kind* of action, because:

> "But the Mexican corporation never was *in* Texas * * * The Mexican corporation was *not before the court* * * * *We need not consider* how far the state may go in imposing restrictions on the conduct of its own residents, and of foreign corporations which have received permission to *do business* within its borders; or how far it may go in *refusing to lend the aid of its courts* to the enforcement of rights acquired *outside* its borders. * * *" (p. 410).

Therefore, it is respectfully submitted that the petition for certiorari should be granted.

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APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 9003. OCTOBER TERM AND SESSION, 1946.

LILLIAN BLEWEISS SMITH, *Plaintiff-Appellant,*

vs.

COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA, *Defendant-Appellee.*

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

November 19, 1946.

Before SPARKS and KERNER, *Circuit Judges,* and HOLLY, *District Judge.*

KERNER, *Circuit Judge.* Upon the death of her husband, plaintiff as beneficiary of a certificate of membership constituting a contract of insurance sued defendant. Defendant filed a motion to dismiss plaintiff's complaint on the grounds (1) that defendant, a New York corporation, was never qualified to do business in Indiana and therefore was not subject to the jurisdiction of the District Court there, and (2) that a one-year limitation in the contract barred plaintiff's action. The trial court filed a memorandum opinion on defendant's motion in which the question of jurisdiction was resolved against defendant, but the motion to dismiss was sustained on the ground that plaintiff's action was barred by the contractual limitation of one year. Plaintiff thereafter petitioned for leave to file an amended complaint wherein it was alleged that the one-year limitation clause was not applicable to plaintiff's case. The District Court denied plaintiff's petition and judgment

was entered dismissing the action. To reverse the judgment, plaintiff appeals.

In 1930 defendant issued to Harry E. Smith, a resident of Pennsylvania, a certificate which insured him upon enumerated conditions against loss by accidental means of life, limb, sight, and time. The insurance benefit against loss of life was $10,000. In 1932 a change of beneficiary was effected and Lillian Bleweiss, intended wife, who later married insured and is the plaintiff here, was made the beneficiary. August 30, 1933, in Atlanta, Georgia, insured was injured, and on October 11, 1933, he died from his injuries. Plaintiff notified defendant of insured's death by letter dated October 18, 1933. Then, or soon afterwards, plaintiff became a citizen of Gary, Indiana, as she established residence with relatives and mailed all her subsequent correspondence regarding the claim from there. She filed proof of loss, and agreed in writing with defendant to allow it to exhume and perform an autopsy upon the body of deceased. March 23, 1934, plaintiff's claim was considered and rejected by defendant and plaintiff was notified of defendant's decision by letter dated March 27, 1934. Thereafter, on September 19, 1935, plaintiff commenced this action.

Unless we hold for plaintiff the question to be decided is whether the cause of action is barred by the one-year limitation clause in the contract.

Defendant is a mutual association doing business on an assessment basis. The certificate or contract was signed and delivered by defendant at its office in Utica, New York, and thereby defendant insured plaintiff's husband, a resident of Greensburg, Pennsylvania. In the certificate there is a specific provision providing: "This contract is . . . to be construed in accordance only with the laws of the State of New York."

In conflict of laws, the *lex loci contractus* may mean either the law of the place where the contract was made or the place of its performance. Here it means the place where the contract was made (New York) because place of performance is not specified, and the rights of membership in an incorporated beneficiary society are determined by the law of the State of incorporation. *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544; *Royal Arcanum* v. *Green*, 237 U. S. 531. Thus, it is clear that we must look

to New York law to determine the validity of the contract's limitation clause. The New York courts have held unequivocally that a one-year limitation in an insurance contract is valid, *Hanna* v. *Commercial Travelers Ass'n*, 142 N. E. 288; *Savery* v. *Commercial Travelers Ass'n*, 263 N. Y. S. 118. Moreover, "parties to a contract of insurance may provide for a shorter limitation of actions than that provided in the general Statute of Limitations." *Brandyce* v. *Globe & Rutgers Fire Ins. Co.*, 168 N. E. 832, 833.

Plaintiff contends, however, that the remedial laws of Indiana apply to a contractual limitation in an insurance contract, *Karvalsky* v. *Becker*, 217 Ind. 524, and that the applicable Indiana statute at the time the action was brought, § 39-1713 Burns' Indiana Stat. Ann. 1913 (original vol. 8), provided that no foreign insurance company could insert a contractual limitation of less than three years. But as the court observed in its memorandum opinion, "The policy had matured before it was in any way affected by the laws of Indiana." As we have already noted, the contract had its origin in New York and was issued to a citizen of Pennsylvania. The insured was injured and died in Georgia. Nowhere does it appear that the parties to this contract ever contemplated performance or that performance was to be had in Indiana. In such a situation we think it is clear that we must look to New York and not Indiana law.

Plaintiff, however, insists that in her amended complaint, which the court did not permit to be filed, are allegations that the notice of death and the proof of loss which emanated from Indiana are conditions precedent to the accrual of the policy. We cannot agree with this reasoning. A contract of insurance matures at death, and notice of death and filing proof of loss, while essential to the payment of claims, are necessarily subsequent to maturity. Moreover, a person cannot select a forum for the commencement of an action and thereby invoke a different and more favorable law other than in strictly procedural matters than exist in the *lex loci contractus*. *Home Ins. Co.* v. *Dick*, 281 U. S. 397. Because the contractual limitation is valid in New York, the *loci contractus*, it is not a violation of the public policy of Indiana to enforce it in Indiana. *Henning* v. *Hill*, 80 Ind. App. 363. In our case Indiana law would be applicable only if the contract had

been issued by an Indiana company. That was the situation in *Karvalsky* v. *Becker, supra,* and it is thereby distinguishable.

Plaintiff also contends that even if the one-year limitation was enforceable, it was waived by the failure of defendant to act within sixty days upon plaintiff's proof of loss. In support of her theory plaintiff relies particularly on paragraph 8 of the certificate which states: "No action at law or in equity shall be brought to recover on this Certificate prior to the expiration of sixty days after proof of loss has been filed . . ." The waiver, plaintiff argues, is based upon dependent covenants arising out of a construction of the contract to the effect that the respective parties were to perform acts alternatively within specified times for the benefit of both parties. It is urged that the contract provides that plaintiff was to furnish proof of loss within ninety days: that defendant was to act with finality on the proof within sixty days; and that legal action, if any, was to be taken within one year.

While it is true that defendant failed to take action within sixty days after receipt of proof of loss, an inspection of the certificate fails to sustain the allegation that defendant was under a duty to plaintiff either to pay or refuse payment on the contract within sixty days after proof of loss. Nothing in the quoted words nor in the balance of the paragraph which refers to the one-year limitation supports plaintiff's contention of a duty existing between defendant and plaintiff. An earlier paragraph in the certificate provides: "Payment of Benefits provided by Section A [loss of life] will be made within sixty days after receipt of due proofs." This statement is considerably more direct but even it fails to raise the presumption of existing duty, because where there is a denial of liability certainly no payments are to be made. Defendant refused payment on the ground that insured's death was due not primarily to the accident, and plaintiff was first notified of defendant's decision on March 27, 1934. This was approximately five and one-half months after plaintiff notified defendant of her claim. The claim was finally rejected on May 8, 1934, about eight months after the date of the accident. Plaintiff, therefore, had sufficient time in which to bring action within the remaining four months of the contract limitation year, yet her action was not commenced until September 19, 1935, about

two years from the date of the accident. Where the pleadings fail to allege bad faith, fraud, or promises to pay, but merely allege delay due to continuing negotiations regarding the claim, and the defendant has done nothing to mislead plaintiff, the reasonable contractual limitation must control. *Continental Ins. Co.* v. *Fire Ass'n of Philadelphia*, 152 F. 2d 239.

Finally, plaintiff argues that the District Court erred in denying her petition to file the amended complaint. There was no error because in this opinion we have considered and rejected the contentions set forth in the amended complaint. The one-year limitation in the contract is controlling and nothing urged by plaintiff nullifies its decisiveness.

The judgment of the District Court is

AFFIRMED.